No. 14,620

IN THE

United States Court of Appeals

For the Ninth Circuit

SIDNEY HING LOWE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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OPINION BELOW.

The District Court did not write an opinion. It rendered an oral ruling appearing in the record at pages 17, 18.

JURISDICTION.

This is an appeal from the order denying the petition for naturalization of the appellant on November 15, 1954 (R. 9, 18). Notice of appeal was filed on December 8, 1954 (R. 10). The jurisdiction of this Court rests upon 28 U.S.C., secs. 1291 and 1294.

STATEMENT OF FACTS.

Appellant is a citizen of China (R. 13, 14). He arrived in the United States on January 29, 1926, at the port of Honolulu on the SS. Niagara (R. 14). In 1928, he changed his status from a visitor to treaty merchant under Article II of the Treaty of 1880 with China, administratively (R. 14, 15). On July 1, 1954, he filed his petition for naturalization No. 15,432 (R. 3). His petition was denied on November 15, 1954 (R. 18).

QUESTION PRESENTED.

When, in 1928, the appellant changed his status from a visitor to treaty merchant under Article II of the Treaty of 1880 with China, administratively, without leaving the country and making a new entry, did he acquire permanent residence for naturalization in compliance with the provisions of 8 U.S.C. sec. 729 (c)?

ARGUMENT.

The case of *United States v. Kwai Tim Tom,* 201 F.(2d) 595 (CCA 9th, 1953), is in point. Kwai Tim Tom's father first came to Hawaii prior to the Act of 1924 as a laborer. As a laborer he could not bring his son, Kwai Tim Tom, into the United States. So, in 1928, he changed his status from a laborer to treaty merchant, administratively, without leaving the country and making a new entry. This court said:

> "The United States claims that if the father had become such a merchant prior to 1924, Kwai would have had the required permanent residence and have been admitted to citizenship. It claims that the Immigration Act of 1924 deprived Kwai's father and Kwai of thus acquiring permanent residence by § 15 (8 U.S.C.A. 215) in effect amending Article II of the 1880 treaty by denying to the aliens thereafter entering the United States a permanent residence and making the residence limited in time.
>
> However, it appears from the opening words of § 215, 'The admission to the United States of an alien,' that its provisions are confined to merchants thereafter seeking admission to the United States. Kwai's father's position was sui generis. He was one of the Chinese in Hawaii on its annexation by the treaty of 1898. He has never sought and is not now seeking admission as a merchant. He is here as a merchant and § 215 does not apply to him. Under the cases above cited he is here as a merchant under Article II of the Chinese treaty entitled to permanent residence and Kwai as his son is a permanent resident. He was properly admitted to citizenship as the husband of an American citizen."

Analogously, the appellant, who is here and remains here, as a treaty merchant under Article II of the Chinese Treaty, is a permanent resident. He did not make an entry in 1928 when he changed his status to a treaty merchant. The word "entry" has a technical meaning. It is a word of art. *Barber v. Gonzalves,* 98 U.S. 675. Appellant did not make an entry

in 1928 under 8 U.S.C.A. sec. 215. If he had, he would have come under the limitation of the Act of 1924. *U. S. v. Kwan Shun Yue,* 194 F.(2d) 225 (CCA 9th, 1952). The latter case shows that Kwan Shun Yue, an adult, arrived in the United States a few months after the Immigration Act of July 1, 1924 went into force and effect, as a treaty merchant and this court held that he came within the limitation of the Act of 1924, and thereby, instead of entering for permanent residence, he was relegated by virtue of the Act of 1924, as a resident limited in time, that is, a non-immigrant.

Chinese merchants, under the terms of the Treaty of 1880 with China, are in the United States for permanent residence. *Cheung Sum Shee v. Nagle,* 268 U.S. 336 (1925) and *United States v. Gue Lim,* 178 U.S. 459 (1900). The Immigration "Rules of October 1, 1926, Governing the Admission of Chinese" implemented such judicial interpretation and provided the procedure for the establishment of Chinese in the United States as treaty merchants under the terms of the treaty without leaving the country and entering again. Pursuant to such rules in 1928, appellant became a treaty merchant. The Immigration Act of 1924, sec. 15 (8 U.S.C.A. 215) modified the status of Chinese, who came in as treaty merchants after the Act of 1924, from that of permanent residence to temporary residence. Said sec. 215 regulates "The admission to the United States of an alien." However, appellant was not seeking admission into the United States, in 1928, when he changed his

status to a treaty merchant. He is here as a treaty merchant and sec. 215 does not apply to him. He is here under the Chinese Treaty. Consequently, he is a permanent resident for naturalization.

CONCLUSION.

It is respectfully submitted that the order of the District Court should be reversed.

Dated, Honolulu, T. H.,
March 2, 1955.

W. Y. Char,
Attorney for Appellant.